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In the

Supreme Court of the United States

No. 71-962

WILLIAM DONALD KELLEY, ET AL,
Petitioners,

v.

THE TEXAS STATE BOARD OF MEDICAL EXAMINERS,
Respondent.

PETITION OF WILLIAM DONALD KELLEY, ET AL FOR WRIT OF CERTIORARI TO THE FORT WORTH COURT OF CIVIL APPEALS (SECOND SUPREME JUDICIAL DISTRICT) AND THE TEXAS SUPREME COURT

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To the Honorable Supreme Court of the United States:

Come now William Donald Kelley and the Kelley Research Foundation, Inc., Petitioners, and make this, their Application for Writ of Certiorari, and in support thereof, would respectively show unto this Court the following:

OPINIONS OF THE COURT BELOW

The only opinion rendered by the Courts below came from the Ft. Worth Court of Civil Appeals, styled *Kelley, et al. v. Texas State Board of Medical Examiners*, 467 S.W.

2d 539 (1971), writ ref. n.r.e. The Court's opinion is appended hereto as Appendix "A".

STATEMENT OF THE JURISDICTION

The Judgment sought to be reviewed (T-75, Appendix "B") was entered by the 17th District Court of Tarrant County, Texas, on July 30, 1970. This Judgment was affirmed by the Fort Worth Court of Civil Appeals (467 S.W. 2d 539 — Appendix "A") on May 7, 1971, rehearing denied June 4, 1971. Petitioners made Application for Writ of Error to the Texas Supreme Court which was refused (without opinion) with the notation "No Reversible Error" on October 6, 1971, rehearing denied on November 3, 1971. This Application for Writ of Certiorari is being filed within ninety days from the date that the Texas Supreme Court denied a rehearing. Jurisdiction is conferred upon this Court by 28 U.S.C.A. Sect. 1257 (2) and (3).

QUESTIONS PRESENTED FOR REVIEW

The questions presented to this Court for review are as follows:

POINT 1

Does the Injunction, heretofore entered in this cause, which prohibits the publication, sale and or distribution of the booklet entitled "One Answer to Cancer" violate these Petitioners' rights to freedom of speech and press, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

POINT 2

Can the State of Texas require any of your Petitioners to be licensed physicians in the State of Texas before

permitting Petitioners to publish their views and theories on cancer.

POINT 3

Is the Texas Medical Practice Act repugnant to the First or Fourteenth Amendments to the Constitution of the United States for the reason that said Act prohibits a person from publishing in the field of medicine unless such person is licensed by the State of Texas as a physician.

POINT 4

Does the publication "One Answer to Cancer" constitute a "clear and present danger" so as to justify a prior restraint on freedom of speech and press, in accordance with the First and Fourteenth Amendments to the Constitution of the United States, and in accordance with the opinions heretofore handed down by this Court.

POINT 5

Do the holdings of the Courts below that a doctor-patient relationship is not necessary to constitute the practice of medicine deny to Petitioners the rights guaranteed by the First or Fourteenth Amendments to the Constitution of the United States.

APPLICABLE PROVISIONS OF LAW

The applicable constitutional and statutory provisions in this cause are as follows:

(A) First Amendment to the Constitution of the United States providing that;

> Congress shall make no law * * * abridging the freedom of speech, or of the press; * * *

(B) Part of Sect. 1 of the Fourteenth Amendment to the Constitution of the United States which provides that;

No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(C) Vernon's Texas Civil Statutes Annotated Vol. 12b, Articles 4495-4512 (Texas Medical Practice Act), with particular emphasis on the following:

Article 4496 — PHYSICIANS TO REGISTER — It shall be unlawful for anyone to practice medicine, in any of its branches, upon human beings within the limits of this State who has not registered in the District Clerk's Office of every county in which he may reside, and in each and every county in which he may maintain an office or may designate a place for meeting, advising with, treating in any manner, or prescribing for patients, the certificate evidencing his right to practice medicine, as issued to him by the Texas State Board of Medical Examiners. * * *

Article 4509 — * * * the Texas State Board of Medical Examiners shall have the right to institute an action in its own name to enjoin the violation of any of the provisions of this Act. Said action for an injunction shall be in addition to any other action, proceeding, or remedy authorized by law. The Texas State Board of Medical Examiners shall be represented by the Attorney General and/or the County or District Attorneys of this State * * *

Article 4510 — WHO REGARDED AS PRACTICING MEDICINE — Any person shall be regarded as practicing medicine within the meaning of this law:

(1) Who shall publicly profess to be a physician or surgeon and shall diagnose, treat, or offer to treat

> any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof; (2) or who shall diagnose, treat, or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method and to effect cures thereof and charge therefor, directly or indirectly, money or other compensation; * * *

STATEMENT OF THE CASE

This Petition stems from a permanent injunction entered by the trial court which enjoins Petitioners from publishing a booklet entitled "One Answer to Cancer". The booklet in question concerns the Petitioners' theories as to the causes and cures for cancer.

Petitioner, Dr. William Donald Kelley, is a licensed dentist in the State of Texas, has a Master of Science Degree, and three years' credit towards a Ph.D. Dr. Kelley is not a physician, and is not licensed to practice medicine.

As a result of his being in the medical field, Dr. Kelley became interested in cancer research, and formed the Kelley Research Foundation. After many years of study, Dr. Kelley formulated his own ideas as to the cause of cancer and methods of treatment, and published his theories in a booklet entitled "One Answer to Cancer". The Medical Association opposed the distribution of the booklet and sought to have the State of Texas enjoin the publication through the Texas State Board of Medical Examiners, pursuant to the authority granted to the Board under the Texas Medical Practice Act. (Art. 4495-4512, p. 4 supra)

The State filed the injunction suit and obtained a temporary restraining order without notice on December 1, 1969 (T - 47). Petitioners answered the suit alleging that any such injunction would violate Petitioners' constitutional rights of freedom of speech and press (T - 57, 67). On January 15, 1970, the temporary restraining order was continued in the form of a temporary injunction (T-58). On July 30, 1970, the injunction was made permanent (T-75, Appendix B).

Petitioners appealed to the Fort Worth Court of Civil Appeals, specifying as assignments of error all of the constitutional grounds raised herein. The Court overruled all constitutional arguments, reasoning that the booklet did, in and of itself, constitute the practice of medicine: (467 S.W. 2d 539, 544; Appendix A p. A-8)

> We find and hold that the publication, "One Answer to Cancer", is a diagnosis, treatment, and offer of treatment, and therefore constitutes the practice of medicine under the provisions and within the meaning of the Texas Medical Practice Act, Art. 4510, et seq.

The Court further reasoned that because the publication did constitute the practice of medicine, the interest of the State to restrain an unlicensed person from practicing medicine was paramount to Petitioners' rights of freedom of speech and press: (467 S.W. 2d 539, 545; Appendix A p. A-10)

> The argument of the Defendants to the effect that assuming the pamphlet does constitute the practice of medicine, their right of free speech overrides the State's interest and right to protect the general public is untenable.

> It is the practice of medicine by an unlicensed person which creates an immediate danger to the public and entitles a Court of the State of Texas as a matter of law and equity to enjoin such unauthorized activities, so as to reasonably protect the public from unauthorized and unskilled practitioners.
>
> * * * The injunction is a permissible remedy authorized by the Medical Practice Act if such a remedy is the only reasonable means to accomplish the purposes of the Act.
>
> The constitutional rights of speech and publication are not absolute and in a given case where the public interest is involved, Courts are entitled to strike a balance between fundamental constitutional freedom and the State's interest in the welfare of its citizens. The Constitutional guarantee of freedom of expression must yield in the case at bar to afford reasonable protection to the public * * * .

After the Fort Worth Court of Civil Appeals overruled Petitioners' Motion for Rehearing, Petitioners applied to the Texas Supreme Court for a Writ of Error, again raising the constitutional grounds alleged herein. The Texas Supreme Court refused to hear the Application, and denied Petitioners' Motion for Rehearing.

ARGUMENT AND AUTHORITIES

Part A — Balancing of Interests is Not the Test

Although countless volumes of scholarly material have been written on the law pertaining to the subject matter, the underlying principles pertaining to freedom of speech cases are basic. The First Amendment rights of freedom of speech and press are fundamental rights, which are safeguarded from state infringement by the Due Process Clause of the Fourteenth Amendment. *De Jonge v. Oregon*, 299

U.S. 353, 364, 57 S. Ct. 255, (1937). As applied to the states, freedom of speech cases are broken down into two basic categories. The first, like the case at bar, is where the State seeks to suppress the speech itself; i.e., a "prior restraint" case. The second category is where the state seeks to punish, by criminal statute or otherwise, for words previously spoken, such as in *Gitlow v. New York*, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925). The significant distinction between these two classes of cases is that in the latter class, the state seeks punishment only, while in a "prior restraint" case, the state seeks to suppress the speech itself. The Courts below failed to recognize this distinction.

The lower Courts are taking the attitude in this cause that all they need to do is balance the interest of the public to suppress against Petitioners' rights of free speech and press. Whichever the Court considers more important shall prevail. (Appendix A p. A-11, 467 S.W. 2d at p. 546):

> The constitutional rights of speech and publication are not absolute and in a given case where the public interest is involved, Courts are entitled to strike a balance between fundamental constitutional freedom and the State's interest in the welfare of its citizens. The constitutional guarantee of freedom of expression must yield in the case at bar to afford reasonable protection to the public. *Palmer v. Unauthorized Practice Comm. of the State Bar*, 438 S.W. 2d 374, supra; Article I, Sections 8 and 16, Constitution of Texas; *Gitlow v. New York*, 268 U.S. 652, 666, 668, 45 S.Ct. 625, 69 L.Ed. 1138 (1925).

Even if the foregoing is the law with reference to the punishment category of free speech cases, Petitioners believe that in the prior restraint category, such an interpretation of

the law is totally inaccurate and far afield from the decisions heretofore handed down by this Court. "Balancing of Interests" is precisely the type of doctrine which was objected to by Mr. Justice Douglas concurring in *New York Times v. U. S.*, 403 U.S. 713, 91 S. Ct. 2140, 2146 (1971):

> The Government says that it has inherent powers to go into court and obtain an injunction to protect that national interest, which in this case is alleged to be national security. *Near v. Minnesota, Ex Rel Olsen*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357, *repudiated that expanse of doctrine in no uncertain terms.* (Emphasis added)

The only Federal case cited by the Court below in support of their holding in this area is *Gitlow v. New York*, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925). Although one may take phrases out of context from *Gitlow* in support of the holding below, *Gitlow* dealt only with the area of permitting punishment for those who abuse the First Amendment privileges. A prior restraint was not involved in *Gitlow*, and *Gitlow* is inapplicable as cited. Rather, the principles in *Gitlow* were basically the same as those quoted from from *Blackstone* by Chief Justice Hughes in *Near v. Minnesota*, 283 U.S. 697, 714, 51 S. Ct. 625, (1931):

> * * * Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he published what is improper, mischievous or illegal, he must take the consequences of his own temerity.

Chief Justice Hughes made it crystal clear that the constitutional protections against prior restraint were much

greater than the protections from being punished for improper speech. *Near v. Minnesota, supra, pp.* 713-716.

It is one thing for a person to be able to speak and publish freely and be subject to punishment for abuse, but yet quite another to be subject to the law set forth by the Court below where a person cannot speak or publish at all in the first place. The Texas Supreme Court long ago recognized the difference between punishment on the one hand and prior restraint on the other. In speaking of the free speech provisions of the Texas Constitution, the Texas Supreme Court stated precisely what should be applicable to the case at bar by reason of the Federal Constitution. *Ex Parte Tucker*, 220 S.W. 75, 76 (Tex. S. Ct. - 1920):

> [P]unishment for the abuse of the right, not prevention of its exercise, is what the provision contemplates. There can be no liberty in the individual to speak, without the unhindered right to speak. It cannot coexist with the power to compel his silence or fashion a form of his speech * * *
>
> *It has never been the theory of free institutions that the citizen could say only what courts or legislatures might license him to say* * * * Every person shall be left at liberty to speak his mind on all subjects, and for the abuse of the privilege, be responsible in civil damages and subject to the penalties of the criminal law. (Emphasis added)

To Petitioners' knowledge, this Court has never held that a state may simply balance interests of the parties to justify a restraint on speech. This Court is now asked to accept a case on certiorari in which a state court cites a previous holding of this Court as standing for a new and

different concept in the area of prior restraint. The opinion below is a landmark decision in constitutional law. If permitted to stand, it will not only create new concepts and guidelines for prior restraint cases in Texas, but may very readily be followed in numerous other jurisdictions as well. Anybody shephardizing *Gitlow v. New York*, *supra* or *Dent v. West Virginia*, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889) will locate the opinion of the Court below quite easily. Moreover, the opinion below will in all likelihood be reported in ALR 3d, by reason of the opinion below having cited 22 ALR 3d 1092 (Appendix A p. A-9). All of the ammunition is present for the opinion of the Court below to become well-recognized throughout the country. It follows therefore that all the criteria are present for the granting of this application for Certiorari.

Part B — The Clear and Present Danger Doctrine

Other than speech classified as obscene and "utterly without redeeming social value", this Court has recognized only one exeception permitting a prior restraint of free speech or press, that exception being the Clear and Present Danger Doctrine. The leading cases in this area have held that to justify a prior restraint, the evidence must establish an immediate danger of serious injury which is neither doubtful nor remote. The evil threatened must be substantive and the degree of emminence extremely high. *Whitney v. California*, 274 U.S. 357, 47 S. Ct. 641 (1927).; *Thomas v. Collins*, 323 U.S. 516, 65 S. Ct. 315 (1945), reh. den. 323 U.S. 819; *West Virginia State Board of Education v. Barnette*, 319 U.S.

624, 63 S. Ct. 1178 (1943); *Bridges v. California*, 314 U.S. 252, 62 S. Ct. 190 (1941). The present state of the law was recently summarized by Mr. Justice Brennan, concurring, in *New York Times Co. v. U. S.*, 403 U.S. 713, 19 S. Ct. 2140, 2147 (1971):

> The entire thrust of the government's claim throughout these cases has been that publication of the material sought to be enjoined "could" or "might" or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result. Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation "is at war". *Schenck v. United States*, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470 (1919) * * *. "The chief purpose of [The First Amendment's] guarantee [is] to prevent previous restraints upon publication." *Near v. Minnesota, Ex Rel Olsen, supra*, at 713, 51 S.Ct., at 630. Thus, only governmental allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient.

Petitioners believe in accordance with the law quoted above that anything short of a showing by the State in the case at bar that Dr. Kelley's publication would inevitably result in death to the readers would also be short of that showing necessary to constitute a clear and present danger. The first prerequisite that the State had to accomplish such

a showing was to have introduced evidence establishing unequivocally the falsity of the theories espoused in the publication. Even permitting a prior restraint had the foregoing been done would be giving the State the benefit of the doubt, as this Court has heretofore held that the truth or falsity of the publication is immaterial as far as a prior restraint is concerned. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S. Ct. 1575 (1971). (When this statement has been used by this Court in the past, it has been used in the context that even if the published statements were false, this did not prevent the right to publish them. It follows afortiori that if Dr. Kelley's theories may be true, that the publication should be permitted to be published, regardless of whether or not he is licensed as a physician.)

Turning now to the evidence actually introduced, it is striking to note that the State did not introduce one word of testimony or one shred of evidence which even implies that there was anything dangerous or wrong with the theories set forth by Dr. Kelley in the publication. To the contrary, Dr. Robert Jones, a licensed Texas physician, testified that the publication was not dangerous and that the publication would be helpful to society (S.F. 165-166):

> Question: Doctor, would you give us your expert opinion, if you have one, as a physician, as to what this book says?
>
> Answer: This book proposes a theory as to the causation of cancer, which in my experience is somewhat unique. There are approaches to the study and the treatment of the disease that are really new to me, and many that are not new to me. The opinion that he has,

I think, could be considered controversial, but not impossible. In other words, nobody knows what causes cancer, and I think one man's theory is as good as another.

Question: Is it possible, then, that this book has some medical credence?

Answer: It is possible that this book does have some medical credence, and in certain areas, I am positive that there are directions that would be helpful for a person with cancer, yes, sir.

Question: Now, if a layman were to pick up this book and read it, doctor, in your opinion as a physician and as a medical man, is there anything in there that's dangerous to the average layman?

Answer: I do not think so.

The potential value to this country of Dr. Kelley's publication can be well-illustrated by some purportedly "startling new" discoveries by the medical community itself. It appears that the medical community may well be reaching the same theories as set forth by William Donald Kelley in the publication here at issue.

The theories set forth in "One Answer to Cancer" revolve in their entirety around the use of dietary intake to combat cancer. The intake of too much protein is labeled as the primary cause of cancer. (Appendix C, p. 23):

PROTEIN

We have maintained throughout this treatise that cancer is nothing more than a pancreatic enzyme deficiency. The greatest cause of this deficiency is the amount of second-hand protein fed into the body. The pancreas just simply cannot manufacture enough en-

zymes to digest the large volumes of milk, cheese, meat, and peanuts we eat and have enzymes left over to digest the foreign protein we know as cancer.

On June 4, 1971, Dr. Robert A. Good, one of the world's leading immunologists, published his research which was sponsored by grants from the American Heart Association, the American Cancer Society, the March of Dimes and the U. S. Public Health Service. The report was published in *Nature*, Vol. 231, No. 5301, pp. 323-325. On October 20, 1971, Dr. Good announced to the press his findings as contained in the report above cited. His announcement was published in newspapers from coast to coast from October 20-26, 1971. The publication, as it appeared in the New York Times, is set forth in Appendix D. His findings are almost identical to the theories propounded in "One Answer to Cancer."

In the November 6, 1971, issue of the *NATIONAL OBSERVER*, Dr. Roger J. Williams' theories on fighting cancer by nutrition are set forth in an article entitled "Super Nutrition Proposed for Fighting Cancer." This article was preceded by a similar article in the New York Post on October 26, 1971. Both articles are very much akin to the practice set forth in "One Answer to Cancer" (The New York Post article is reprinted in Appendix D)

Dr. Kelley's publication and theories long preceded those set forth by the other authorities above, and indeed, a new area and approach to cancer research may well be coming to the surface. Theories such as those set forth by Dr. Kelley in "One Answer to Cancer" should be encouraged, not discouraged.

One could understand the State seeking to enjoin a publication which would inevitably send people to their graves, or cause other catastrophic events of like consequence, but it taxes credulity to imagine the permitting of an injunction which may very possibly be of significant medical value, simply because the author is not licensed as a physician.

Not only did the evidence show a complete lack of anything dangerous in the publication, but the pleadings of the State were to the same effect. The only danger even alleged by the State in their pleadings (T - 6) was that the publication constituted a violation of law (the Texas Medical Practice Act) and was therefore dangerous. Accordingly, the Courts below had nothing else upon which to support the finding that the publication created a clear and present danger other than the finding that the publication constituted the practice of medicine. This reason was the only reason given by the Courts below in support of their holding that there was a clear and present danger (Appendix A p. A-10):

> It is the practice of medicine by an unlicensed person which creates an immediate danger.

Petitioners submit that the Court's logic in this regard is begging the question. If the publication creates a clear and present danger, then the same danger is created regardless of whether or not the author is a physician. The existence of a clear and present danger must be determined by the contents of the words that are spoken, not by the qualification of the author.

Even if one assumes as true the generalization that it is dangerous to the interests of the community for unlicensed person to practice medicine, such a statement is a generalization only, and it does not necessarily follow that each time an unlicensed person practices medicine that a danger will result. Petitioners do not dispute the right of the State to freely regulate the practice of medicine in that area normally regarded as practicing medicine, but where the practice of medicine consists only of a publication, the court must determine in each case whether or not the publication constitutes a clear and present danger so as to justify a prior restraint. This Court has heretofore pointed out that every case of prior restraint must stand on its own two feet, and in each individual case, the court must inquire whether the gravity of the evil, discounted by its improbability, justified such invasion of free speech as is necessary to avoid the danger. *Dennis v. U. S.*, 341 U.S. 494, 71 S. Ct. 857 (1951). Broad generalizations that any publications in a given area constitute a clear and present danger are not sufficient, and such a generalization is precisely what the Court has done in this case without any evidence or any finding of the danger itself.

The publication here under consideration does more than present the author's theories on cancer. In addition, it is a criticism of the medical profession's efforts in this area, as the following quotations from the publication indicate:

> Under the very best of conditions, the accepted methods of clinical judgment and biopsy are inadequate. This is not specifically the fault of your doctor,

> for he is doing the best he knows. His education or knowledge is lacking in this area. (T-34; Appendix C. p. 11)
>
> The organized medical profession is spending well over one million dollars each day in the United States alone, to find a "cure" for cancer, and has never seriously investigated the possibility that cancer could be a deficiency disease. (T-31; Appendix C. p. 5)
>
> Today, most clinicians have the mistaken belief that cancer is complex; a number of different diseases, each having its own cause. Nothing could be further from the truth. (T-32; Appendix C. p. 7)

Norman Dacey heretofore published "How to Avoid Probate!" which criticized the legal profession in much the same way as Dr. Kelley has criticized the medical profession. For the same reasons as Petitioners urge herein, Dacey's publication was held to be protected by the First Amendment against the allegation that the publication constituted the practice of law. *New York County Lawyers' Assn. v. Dacey*, 287 N.Y.S. 2d 422, 234 N.E. 2d 459, adopting the dissenting opinion in 283 N.Y.S. 2d 984 (1967).

> Dacey's criticism of what he considers the high cost of probate is a right of speech to which he is entitled. Of course, if the exercise of Dacey's right to freedom of speech by this publication violates reasonable standards erected for the protection of society, or of important interests of society, his right could be subordinated for the common good and the protection of the whole. In my view, this book may not be so considered. The dangerous tendency or Clear and Present Danger doctrines (citing cases) are not applicable * * * Unless we are to extend a rule of suppression beyond the

> obscene, the libelous, utterance of or tending to incitement, and matters similarly characterized, there is no warrant for the action here taken.

The same conclusion was reached by the Second Circuit with reference to Dacey's litigation in Federal Court. 423 Fed. 2d 188, 192 (2d Cir. 1969). The case at bar, like *Dacey*, is simply not susceptible to a finding of clear and present danger, and the injunction issued is without basis in law.

Part C — The Lack of a Doctor-Patient Relationship

The Courts below held that the booklet constitutes the practice of medicine under the Texas Medical Practice Act, and is therefore ipso facto a clear and present danger which must be enjoined (Appendix A p. A-8, 10). If, however, the booklet in question does not constitute the practice of medicine, then there has been no clear and present danger, and the injunction has violated the Due Process Clause of the Fourteenth Amendment. Although the foregoing sentence may appear at first glance not to follow logically, the argument is reasoned upon the logic of the Court below. The one and only danger created by the publication, according to the Court below, is the finding that the publication constitutes the practice of medicine. In the words of the Court (467 S.W. 2d at 546; Appendix A p. A-10):

> It is the practice of medicine by an unlicensed person which creates an immediate danger to the public and entitles a Court of the State of Texas as a matter of law and equity to enjoin such unauthorized activities, so as to reasonably protect the public from unauthorized and unskilled practitioners.

Assuming arguendo that the practice of medicine without a license is a clear and present danger, as contemplated by the prior decisions of this Court, there could still be no injunction against the publication if the publication did not in fact constitute the practice of medicine. In that case, the only danger found by the Courts below would not exist, and the injunction would be violative of the Fourteenth Amendment. Accordingly, Petitioners urge that the publication does not constitute the practice of medicine.

It seems elementary that an essential ingredient of practicing medicine is the actual existence of a relationship between the doctor and patient. Indeed, it is only because of this relationship that the State requires a license in the first place.

An analagous situation is the litigation of Mr. Norman Dacey, in connection with his publication entitled "How to Avoid Probate!" The New York Bar brought an action against Dacey to enjoin the publication and distribution of the book, and to have Dacey held in criminal contempt for the unauthorized practice of law. The New York Supreme Court enjoined the sale and distribution of the book. *New York County Lawyers' Assn. v. Dacey*, 282 N.Y.S. 2d 985 (S. Ct. 1967). Dacey's appeal from the New York Supreme Court to the New York Appellate Division was unsuccessful, and in October, 1967, the New York Supreme Court was upheld in a four-to-one decision, Justice Stevens dissenting. *New York County Lawyers' Assn. v. Dacey*, 283 N.Y.S. 2d 984 (1967). However, two months later in

December, 1967, the New York Court of Appeals reversed the decision of the Appellate Division, and adopted the dissenting opinion of Justice Stevens. *New York County Lawyers' Assn. v. Dacey*, 287 N.Y.S. 2d 422, 234 N.E. 2d 459 (1967). At the same time, Dacey was engaged in litigation in Federal Court. On appeal to the Second Circuit, Judge Irving Kaufman, in commenting upon Dacey's State litigation, pointed out that the reason for Dacey's success was premised on the same argument which Petitioners urge in the case at bar, that being that the publication could not constitute the practice of medicine because of the lack of the doctor-patient relationship. *Dacey v. New York County Lawyers' Assn.*, 423 Fed. 2d 188, 190 (2d Cir. — 1969).

> In concluding that the sale and distribution of *"How to Avoid Probate!"* did not constitute the unauthorized practice of law, Justice Stevens had emphasized that the book was sold to the public at large and that no relation of personal trust and confidence arose between Dacey and the purchasers of his book.

Justice Stevens' opinion, with medical practice substituted for legal practice, states precisely why Dr. Kelley's publication cannot be considered the practice of medicine. 283 N.Y.S. 2d 984, 997-999, as adopted in 287 N.Y.S. 2d 422:

> Stripped of the arguments and contentions of the various parties, the question may be briefly and baldly expressed; does the writing, publication, advertising, sale and distribution of "How to Avoid Probate!" constitute the unauthorized practice of law * * * It cannot be claimed that the publication of a legal text which purports to say what the law is amounts to legal practice. And the mere fact that the principles and rules

> stated in the text may be accepted by a particular reader as the solution to his problem, does not affect this * * * Dacey's book is sold to the public at large. There is no personal contact or relationship with a particular individual. Nor does there exist that relation of confidence and trust so necessary to the status of an attorney and client. This is the essential of legal practice — the representation and the advising of a particular person in a particular situation. The lectures of a law school professor are not legal practice for the very reason that the principles enunciated or the procedures advised do not refer to any activity in immediate contemplation, though they are intended and conceived to direct the activities of the students in situations which may arise * * * In order to sustain Petitioner's position, one has to conclude that the book by its very nature comprises the unauthorized practice of law. "How to Avoid Probate!" is in one sense a do-it-yourself kit * * * Every individual has a right to represent himself if he chooses to do so, and to assume the risks attendant upon what could prove a precarious undertaking * * * In all the cases where there was a holding of unlawful practice of law, there was some employment, expressed or implied, resulting either from contract, designation or assignment. It would seem logical that for one to be guilty one must improperly or illegally have created or assumed such a relationship.

If Dr. Kelley's publication constitutes the practice of Medicine, then virtually every publication in the medical field likewise constitutes the practice of medicine. All of a sudden, the states will have the authority to regulate scientists, researchers, and others from publishing in a field so vital to the health and public welfare of this Country. Similarly, in any other profession, trade or occupation where a

license is required, the states would be able to regulate any and all publications in such profession, trade or occupation by holding such publications to constitute the practice of the respective profession, trade or occupation. Moreover, in most instances where a state requires a person to obtain a license in a given profession, a license issued by another state in the same profesion will not be sufficient. For example, under the Texas Medical Practice Act, a person who is licensed to practice medicine in another state cannot practice in Texas, and is just as much in violation of the law by practicing medicine in Texas as is an individual practicing medicine in Texas with no license at all. Therefore, in accordance with the holding of the Courts below, physicians licensed in New York, California, Michigan or any other state are not permitted to have articles published in Texas. The same would be true of every other profession. No legal distinction can be drawn between a New York physician publishing in Texas and the case at bar. As a practical matter, the answer is in the fact that a publication directed to the public at large simply does not constitute the practice of medicine. To hold otherwise would be to sanction a series of restraints on published material so as to bring a complete turnabout in the law of freedom of the press as it is known today.

Part D — Constitutionality of the Texas Medical Practice Act

This Court in the past has, on occasion, held that this Court is bound to accept the State Court's interpretation

of a State statute which may be in question. *Coleman v. Alabama*, 399 U.S. 1, 9-10, 90 S. Ct. 1999, 2003, 26 L. Ed. 2d 387 (1970); *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U.S. 684, 688, 79 S. Ct. 1362, 1365, 3 L. Ed. 2d 1512 (1959). Such a holding in the instant case would let stand that part of the opinion of the Court below to the effect that the publication in question constitutes the practice of medicine under the Texas Medical Practice Act, and that the Texas Medical Practice Act authorizes the enjoining of the publication. Accordingly, should this Court for any reason be unwilling to reverse that part of the opinion below just set forth, then Petitioners urge that those parts of the Texas Medical Practice Act which deny Petitioners the right to publish and which authorize the injunction granted below, are in violation of the First and Fourteenth Amendments to the Constitution of the United States.

Petitioners have heretofore urged that the injunction itself is unconstitutional. Without being repetitious, all of the reasons heretofore urged that the injunction is unconstitutional, as set forth in Parts A, B and C of the argument herein, are also urged as the same grounds for holding the Act itself unconstitutional by reason of the Act prohibiting Petitioners' right to publish in the first place (Art. 4498). Likewise, the identical grounds and arguments thereunder are more than sufficient to hold the Act unconstitutional by reason of the Act's authorizing the injunction granted by the Courts below (Art. 4509).

Moreover, the Texas Medical Practice Act, when viewed in accordance with the holding of the Court below, specifically requires an individual to obtain a license from the State before permitting the individual to publish. This type of law has heretofore been condemned by this Court as being in violation of the Fourteenth Amendment. *Saia v. New York*, 334 U.S. 558, 68 S. Ct. 1148 (1948). Petitioners urge the same holding in the instant case.

Finally, the Act does not contain any provision requiring a court to find a clear and present danger before issuing an injunction creating a prior restraint. By not requiring a finding of clear and present danger, the Act omits the most essential ingredient necessary to justify prior restraints. (See argument Part B supra). It is immaterial whether or not there is a clear and present danger in the instant case, because the Act does not require a finding that there is one in the first place. The injunction is authorized by the Act regardless of whether the danger does or does not exist. Accordingly, the Act violates the Fourteenth Amendment to the United States Constitution.

Part E — Conclusions

This Court has held that any case of prior restraint comes to this Court with a very heavy burden against the validity of such restraint. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S. Ct. 1575 (1971). The State has not even taken the first step to overcome the burden in the case at bar.

Many of the leading cases in the free speech area heretofore handed down by this Court have set forth the reasons, underlying principles and importance of the free speech guarantees in this country, with particular emphasis on the concept of being able to discuss new and different ideas. Mr. Justice Brandeis, concurring in *Whitney v. California*, 274 U.S. 357, 47 S. Ct. 641 (1927), stated that "Men feared witches and burnt women. It is the function of speech to free men of the bondage of irrational fears." Admittedly, the theories propounded by Dr. Kelley in "One Answer to Cancer" are new, different and unique, and certainly cannot be expected to be readily accepted by the medical society, a profession of which Dr. Kelley is not a member. But to permit this society, through the arm of the State to obliterate these new ideas is to shoot a bullet through the very heart of the First Amendment. Should Thomas Edison not have been permitted to tell people about an electric bulb for his lack of being licensed as an electrician, this brief would be read over gas lighting. The contents of "One Answer to Cancer" is precisely the nature of speech which the First Amendment was intended to protect, that being the right of individuals to enable society to progress by permitting individuals to freely distribute their new and different ideas, no matter how unacceptable such ideas may appear at the onset.

To sanction the injunction entered below will apparently be the first time that any such injunction has been sanctioned in the fields of science and medicine. It is of the utmost importance for the very state of health and wel-

fare of this country that these fields in particular be left wide open to free and uninhibited discussion without regard to the licenses possessed by the person speaking.

Libraries and bookstores are full of numerous publications in numerous areas requiring licenses, by authors who are not so licensed in such areas. The sustaining of this injunction would give every professional organization in this country the authority to eliminate any such publication as they may not desire, as well as giving all such professional associations the tools necessary to carry forth legal blackmail as to any unlicensed author publishing in their field. The same blackmail could be carried forth as to an author not licensed in the particular state in question.

In the field of criminal law, this Court has set forth extremely stringent procedural requirements, and in so doing, has oftentimes freed a man obviously guilty so that the innocent would be protected at a later date. Likewise, in the area of free speech, this Court has protected some obviously objectionable speech from prior restraint so as to have set the guidelines for the type of speech which should be protected and encouraged, such as "One Answer to Cancer." Petitioners submit that the Courts below have entirely ignored these guidelines.

SUMMARY

PART A — The test used by the Courts below in justifying the injunction creating a prior restraint was a simple test of balancing of interests. Even if this is the test to determine

whether or not punishment is permitted for speech already spoken, this is not the test to determine whether or not a prior restraint is permitted. The test used by the Court below creates a new and different principle in the area of constitutional law regarding free speech.

PART B — The correct test to use in a case of prior restraint is to determine whether or not there exists a clear and present danger in accordance with the guidelines heretofore set forth by this Court. The only danger found by the Court below was the fact that the author of "One Answer to Cancer" was not licensed as a physician. Such a finding is not sufficient to constitute a clear and present danger in accordance with this Court's prior decisions, and such a finding is a generalization only. Whether or not the publication constitutes a clear and present danger should be determined independently of the author's qualifications. The danger must come from the contents of the publication, not from the author's lack of a license.

In addition to presenting the author's theories, the publication in question is a criticism of the medical profession, and is further constitutionally protected by the First Amendment.

PART C — The only clear and present danger found by the Court below was that the publication constituted the practice of medicine by an unlicensed physician. Petitioners contend that the publication does not constitute the practice of medicine because of the lack of a doctor-patient relationship. The First and Fourteenth Amendments prohibit the court

from classifying the publication as the practice of medicine and requiring a license therefor. If the publication does not constitute the practice of medicine, the clear and present danger found by the Court below ceases to exist and the injunction must be dissolved.

PART D — Assuming that the publication does constitute the practice of medicine under the Texas Medical Practice Act, then the Texas Medical Practice Act is violative of the First and Fourteenth Amendments for the reasons that: (1) The First and Fourteenth Amendments prohibit the state from requiring an individual to obtain a license in order to practice free speech: (2) The Act, by classifying any publication in the field of medicine as a clear and present danger (in accordance with the interpretation of the Court below) is a generalization only, and is inadequate to justify a prior restraint in accordance with the decisions heretofore handed down by this Court; (3) The Act permits the issuance of an injunction creating a prior restraint without requiring a finding that the publication to be enjoined creates a clear and present danger. The injunction is authorized regardless of whether the danger does or does not exist.

PART E — The speech sought to be protected in the case at bar is the type of speech which goes to the very heart and intent of the First Amendment. The enjoining of a publication in the field of science and medicine is unheard of and protection of speech in these areas should be first and foremost as to all areas of speech sought to be protected by the courts.

RELIEF SOUGHT — PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that the holding of the Texas Supreme Court that there is "no reversible error" be reversed, that the decision of the Fort Worth Court of Civil Appeals be reversed, and that the injunction heretofore issued in this cause prohibiting the distributing, offering for distribution, offering to sell or selling any publication, including the contents of the publication and booklet entitled "One Answer to Cancer" be dissolved, and that Petitioners recover all costs of court, together with such other and further relief, both general and special, legal and equitable, to which Petitioners may be justly entitled.

Respectfully Submitted,

MARGOLIS & STAFFIN
HARRY W. MARGOLIS
1226 Commerce Street
Dallas, Texas 75202

By: _____
Harry W. Margolis

CERTIFICATION OF SERVICE

I, Harry W. Margolis, Attorney of Record for Petitioners in the above cause, do hereby certify that I have, on this 26 day of January, 1972, sent by first class United States mail, postage prepaid, three copies of this Application for Writ of Certiorari to the following attorney, being the attorney for Respondent, at the address indicated:

Mr. Guy C. Fisher
Assistant Attorney General
Capitol Building
Austin, Texas

Harry W. Margolis

APPENDIX A

No. 17195

IN THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

WILLIAM DONALD KELLEY ET AL.
Appellants,

v.

TEXAS STATE BOARD OF MEDICAL EXAMINERS
Appellee.

FROM THE DISTRICT COURT OF TARRANT COUNTY

OPINION

This appeal is from a permanent injunction granted against the defendants, William Donald Kelley, individually and d/b/a The Kelley Research Foundation, and The Kelley Research Foundation, Inc., a corporation, for practicing medicine without a license. Trial was to the court. Findings of fact and conclusions of law were made and filed. The suit against the defendants was initiated by the Texas State Board of Medical Examiners as plaintiff. The parties will be designated as plaintiff and defendants or by name as in the trial court.

The contentions of the defendants on this appeal are summarized as follows:

First — The court erred in its findings of a great many of the extensive findings of fact made by it and in its conclusions of law based thereon. Defendants assert that many of the findings of fact are insignificant and discussion and

argument pertaining thereto will be omitted because the record is self-explanatory.

Second — There is a lack of evidence to establish that Kelley's examination and testing of the two State employees constituted anything except the practice of dentistry because everything he did was within the boundaries of such practice.

Third — Finally it is contended by the defendants that (1) the publication, "One Answer to Cancer," does not come within the Medical Practice Act and does not violate the specific terms of the Act itself; (2) it is absolutely impossible to practice medicine by the publication and distribution of a book in the absence of a doctor-patient relationship; and (3) assuming the book constitutes the practice of medicine, which is denied, the guarantee of free speech and freedom of press guaranteed by the U. S. and Texas Constitutions override the interest of the State to suppress or prohibit the publication.

We affirm.

It is undisputed that the defendant Kelley is licensed to practice dentistry in the State of Texas. It is also undisputed that Kelley is not licensed to practice medicine in this State. The same is true of The Kelley Research Foundation, Inc.

Based upon the oral argument and the brief of defendants it would appear that their primary concern pertains to that portion of the injunction which prohibits the publication and distribution of the pamphlet, "One Answer to Cancer." Defendants say that since they have not and do not intend to practice medicine that an injunction prohibiting such practice will not affect them.

The practice of medicine is defined in Art. 4510, The Texas Medical Act, V. A. C. S., as follows:

"Any person shall be regarded as practicing medicine within the meaning of this law:

"(1) Who shall publicly profess to be a physician or surgeon and shall diagnose, treat, or offer to treat, any disease

or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof; (2) or who shall diagnose, treat or offer to treat any disease or disorder, mental or physical or any physical deformity or injury by any system or method and to effect cures thereof and charge therefor, directly or indirectly, money or other compensation; provided, however, that the provisions of this Article shall be construed with and in view of Article 740, Penal Code of Texas, and Article 4504, Revised Civil Statutes of Texas as contained in this Act. . . ."

Article 4504, V. A. C. S., provides that, "The provisions of this Chapter do not apply to dentists, duly qualified and registered under the laws of this State, who confine their practice strictly to dentistry; . . .". .

The practice of dentistry in Texas has been defined by Articles 4543, et seq., to undertaking and offering to diagnose, treat, operate or prescribe by any means or methods for any disease, pain, injury, deficiency, deformity, or physical condition, of the human teeth, oral cavity, alveolar process, gums or jaws. (Art. 4551a).

The term "alveolar process" means the bony ridge of either jawbone, which contains the holes or sockets for the roots of the teeth.

A person who is duly licensed as a dentist is not authorized to practice medicine unless he is also duly licensed to practice medicine pursuant to Article 4495, et seq., V. A. C. S.

"One Answer to Cancer," subtitled, "An Ecological Approach to the Successful Treatment of Malignancy" was authored by William Donald Kelley, individually and d/b/a The Kelley Research Foundation in 1967. It was copyrighted in May and in June of 1969. The Kelley Research Foundation charter was approved on December 30, 1969, a date subsequent to the hearing on the temporary injunction. The Articles of Incorporation were signed by the incorporators, William Donald Kelley and wife, Sue Kelley, and

Hood C. Hammond, on December 15, 1969. The offices of Kelley and the Research Foundation are maintained at 205 E. Worth, Grapevine, Texas. The registered agent of the corporation is the defendant, Kelley.

The address of The Kelley Research Foundation appears several times in the pamphlet in which direct solicitation is made for "contributions, donations, or gifts," to help with research projects.

We have carefully examined the entire record in this cause. In our opinion the twenty-seven findings of the trial court which follow this paragraph are fully supported by the evidence and none of such findings are against the great weight and preponderance of the evidence. (1) Dr. Kelley disseminated diagnostic methods of systems, treatment methods, systems and regimes; (2) Dr. Kelley disseminated offers to treat and thereby control, curb or cure certain diseases and disorders, for a stated or known charge; (3) he advocated that a "deficiency of pancreatic enzymes" may be a disease or disorder, physical deformity or otherwise; (4) Dr. Kelley performed certain diagnoses on various individuals through the use of certain tests designed to determine different conditions or functions of the body. Utilizing such test, defendant could tell if pancreas was working properly; (5) Dr. Kelley's examination revealed the pancreas and prostate of the State agent not working properly; (6) very few dentists known to defendant perform blood tests; all the dentists Dr. Kelley knows used laboratories for blood tests; (7) that the functional metabolism index (of defendant Kelley) is not limited to an aid in determining if diseases or disorders, physical deformities or injuries of the oral cavity exist, but rather is a diagnostic technique employed by defendant culminating in a treatment or an offer to treat certain diseases, disorders, physical deformities or injuries consistent with the contents of the book "One Answer to Cancer"; (8) that it is the basic principle of those licensed physicians in Texas that medical professional literature is for the other physicians who are licensed to diagnose and practice; (9) that the book "One

Answer to Cancer": contains certain diagnoses, treatment or offer to treat cancer and other diseases, disorders, etc.; (10) that the purchase price of the book may be paid indirectly as part of the fee for performance of a blood test and examination; (11) that the book implies and states that defendant is a doctor without any qualification or exception as to his being only a licensed dental practitioner; (12) the word "doctor" on the cover implies that he is a physician; (13) that the sub-title "An Ecological Approach to the Successful Treatment of Malignancy" is a concise summary and that the contents relate to a diagnosis, treatment, or offers to treat the system, or bodily disease or disorder, physical deformity or injury; (14) that following the regime in the book could be harmful and detrimental to the body; (15) that the defendants developed their own system or method of disgnosis and treatment for the purpose of combating cancer and other diseases or disorders; (16) that defendant used the book to advertise to secure patients to enable defendant to treat, diagnose and effect cures, and charge for such services directly or indirectly; (17) that the distribution of the book is a grave threat and a clear and present danger of physical or mental injury; or that it is harmful to the general public; (18) that the defendant told Albert Crites that he would be able to determine by the use of the blood test whether or not Crites has cancer in and throughout his body; (19) that a receipt was issued to Albert Crites for a blood test, diagnosis and treatment recommended by defendant; (20) that defendant performed a diagnosis by telling Albert Crites that he did not have cancer but was suffering from pancreatic disorder, which contributed to Crites' general tired feeling; (21) that defendant treated or offered to treat Crites' pancreatic disorder by prescribing certain items as a regime or method to combat the pancreatic disorder and the general tired feeling; (22) that the defendant, William Donald Kelley, told John Sortore that a blood test would reveal if he had cancer in and throughout his body; (23) that the defendant performed a diagnosis by telling Sortore that the blood test indicated that Sortore had a physical disorder of the

prostate and liver; (24) that the defendant treated or offered to treat John Sortore by prescribing certain items as a regime or system to combat the prostate and liver disorders and Sortore's generally tired feeling; (25) that defendant, William Donald Kelley, claimed that he was able to diagnose and determine disorders in a period of four (4) days, whereas a licensed physician would take six years; (26) that John Sortore correctly concluded that defendants were diagnosing and treating or offering to treat him for prostate and liver disorders, as such disorders were related to his body and not as such to his teeth; and (27) that a receipt was issued to John Sortore for examination and lab test.

"In construing the Medical Practice Act, and in determining what constitutes the practice of medicine thereunder, it has been the long and consistent holding of this court that one who publicly professes to treat diseases or disorders, and to effect cures thereof, or one who in fact treats diseases or disorders as a profession or avocation is practicing medicine, regardless of the system or method employed, the name by which the system is known, or whether or not drugs or surgery are used. The practice of medicine, as contemplated is defined by law is not restricted to the treatment of diseases and disorders of the human body by the use of drugs or surgery." Ex Parte Halsted, 182 S.W. 2d 479, 483 (Ct. of Crim. App. of Texas, 1944).

Therefore, if, as prescribed by the Medical Practice Act, Article 4510, et seq., V. A. C. S., the evidence shows either of the above forms of practicing medicine, as defined in Ex Parte Halsted, supra, then the injunction as entered by the trial court has adequate support at law, as it applies to defendant, Kelley.

The Legislature by statute may make reasonable classifications of practitioners. Such classifications are not inhibited by the provisions of the 14th Amendment to the Federal Constitution. Ex Parte Halsted, supra; Dent v. West Virginia, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623. The practice of dentistry has been restricted in the State by Articles

4543, et seq., supra. The limitation of such practice has been previously described above. The fact that the defendant, Kelley, was a duly licensed dentist, did not authorize him to practice medicine. A dentist who publicly represents himself as a dentist and who limits his practice to that of a dentist is excepted from the law requiring a certificate for the practice of medicine. When he represents himself as a physician by publicly professing to diagnose, treat and effect cures for cancer or is in fact diagnosing, treating and effecting cures for cancer for pay, he is not within the exception provided by law, as it applies to dentists.

The book, "One Answer to Cancer," its contents and textual material and the statements made therein by defendant in and of itself constitutes a "public profession" of the practice of medicine by the defendant. It is the combined effect of the entire book and not just the front page, which undoubtedly caused the trial court to conclude that said publication represented a "public profession" of the practice of medicine. Aside from the pamphlet the defendant, Kelley, publicly professed to both Albert Crites and John Sorotore, that he could determine by the use of a blood test whether they had cancer. This constitutes a public profession of the practice of medicine. It is not necessary in connection with such statements or activity to say you are a medical doctor, a physician or a surgeon, if what you say and do fall within the definitions of the Texas Medical Practice Act. The defendant admits that he used his metabolism index for determining the different functions and conditions of the body for about 25% of his patients. By his own admission therefore, he was actively holding himself out publicly as a physician by his use of such test.

Under the second test, by which a person is regarded as practicing medicine, the trial court would have considerably less difficulty in determining that the defendant Kelley was diagnosing, treating, or offering to treat and effect cures for money and was therefore not limiting his activities to the practice of dentistry.

We find and hold that the defendant, Kelley, publicly professed to be a physician or surgeon and that he was engaged in the unlawful practice of medicine within the meaning of the Texas Medical Practice Act, Article 4510, et seq., V. A. C. S., because of his conduct above described in connection with his authorship of the pamphlet, "One Answer to Cancer," and his conduct with reference to Crites and Sortore.

The defendant, Kelley, contends that the statutes have failed to clearly draw the line between the practice of dentistry and the practice of medicine. We disagree. The statutes distinctly restrict the practice of dentistry to the areas of the body mentioned above and the treatment of the general conditions and functions of the body are reserved to medical doctors.

The testimony of Albert Crites and John Sortore concerning the actions and statements of the defendant, Kelley, is more than adequate to support the findings of the Court. Kelley as a licensed dentist did not confine his practice to dentistry. He was practicing medicine. The trial court was correct to enjoin such unauthorized practice.

We come next to the points by which defendants contend that the publication, "One Answer to Cancer," when tested by the provisions of the Texas Medical Practice Act, is not a publication which constitutes the practice of medicine in any form, and assuming it was, the injunction as entered is too broad and exceeds statutory authority in enjoining the distribution and sale of the publication rather than to limit such injunction to sale only.

We find and hold that the publication, "One Answer to Cancer," is a diagnosis, treatment, and offer of treatment and therefore constitutes the practice of medicine under the provisions and within the meaning of the Texas Medical Practice Act, Art. 4510, et seq., supra. Ex Parte Halsted, 182 S.W. 2d 479, supra. The trial court's conclusion that the publication constitutes an advertising scheme wherein the defendant Kelley solicits medical patients is fully sup-

ported by an examination of the pamphlet itself. It becomes more obvious when considered along with the testimony and evidence adduced through the witnesses, Albert Crites and John Sortore.

Both Crites and Sortore stated that they received a copy of "One Answer to Cancer" upon the payment of $1.00, as well as an examination and lab test fee of $50.00, while being treated by Kelley. The record fully supports the findings that defendants have utilized the book, "One Answer to Cancer," as an advertising scheme, with which to secure individuals as patients, to enable defendants to diagnose, treat, or offer to treat a disease or disorder, physical deformity or injury by a system or method described within said book, attempting to effect cures thereof, and for which such patients were charged directly or indirectly.

The continued distribution of the book, directly or indirectly by the defendants, would constitute a grave, immediate threat of irreparable harm, a clear and present danger of physical or mental injury or harm to the general public. Such a threat would continue to exist although defendants individually may be enjoined from the practice of medicine. The publication is being used as an illegal tool to aid and abet the unlawful practice of medicine in which actual doctor-patient relationships are being formed. Grievance Committee of Bar of Fairfield Co. v. Dacey, 154 Conn. 129, 222 A. 2d 339, 22 A. L. R. 3d 1092. In the above case the Connecticut Court enjoined the further sale and publication of legal forms. The appeal was dismissed by the U. S. Supreme Court for want of a substantial federal question. 386 U.S. 683, 18 L. Ed. 2d 404, 87 S. Ct. 1325.

The case of Palmer v. Unauthorized Practice Com. of State Bar, 438 S.W. 2d 374 (Houston Civ. App., 14th Dist., 1969, no writ hist.) involved an action for injunctive relief to restrain defendants from engaging in alleged unauthorized practice of law by offering for sale to the general public wills and will forms. The district court granted temporary injunctive relief. On appeal the Court of Civil Appeals held that the sale of will forms to the public by untrained

laymen fell within statutory prohibition barring an unlicensed person from practicing law in this State. The case emphasized the right of the State to protect the public interest and the welfare of its citizens and that constitutional guarantee of freedom of expression must yield to permit the rendition of such a decree as is necessary for the reasonable protection of the public.

The defendants contend that the book, "One Answer to Cancer," does not present any "clear and present danger" to society and that no evidence was introduced at the trial court which would support a finding of any danger much less a "clear and present danger." That even if the publication constitutes the practice of medicine, the guarantee of free speech and freedom of the press set forth in the Texas Constitution and the United States Constitution overrides the interests of the State to suppress or prohibit this publication.

We are of the opinion that the testimony of Dr. Jones as well as that of the defendant, Kelley, is more than sufficient evidence to support the holding that continued distribution of the book, directly or indirectly by the defendants, would constitute a grave, immediate threat of irreparable harm and a clear and present danger of physical or mental injury or harm to the members of the general public.

The argument of the defendants to the effect that assuming the pamphlet does constitute the practice of medicine their right of free speech overrides the State's interest and right to protect the general public is untenable.

It is the practice of medicine by an unlicensed person which creates an immediate danger to the public and entitles a Court of the State of Texas as a matter of law and equity to enjoin such unauthorized activities, so as to reasonably protect the public from unauthorized and unskilled practitioners.

By authority of Article 16, Section 31 of the Texas Constitution, and the general police power, the Legislature has defined the practice of medicine and has enacted rules

and regulations governing the practice thereof. It is the right and duty of the State to regulate and control medical practice, so that the public safety and welfare will be served and promoted. The injunction is a permissible remedy authorized by the Medical Practice Act if such a remedy is the only reasonable means to accomplish the purposes of the Act.

The constitutional rights of speech and publication are not absolute and in a given case where the public interest is involved, Courts are entitled to strike a balance between fundamental constitutional freedom and the State's interest in the welfare of its citizens. The constitutional guarantee of freedom of expression must yield in the case at bar to afford reasonable protection to the public. Palmer v. Unauthorized Practice Com. of State Bar, 438 S.W. 2d 374, supra; Article I, Sections 8 and 16, Constitution of Texas; Gitlow v. New York, 268 U.S. 652, 666, 668, 45 Sup. Ct. 625, 69 L. Ed. 1138 (1925).

To hold otherwise would permit the defendant Kelley, to transfer his unauthorized practice of medicine to the pamphlet, "One Answer to Cancer," which contains advertising material which endows him as the author with consummate skills and knowledge beyond the reach of all other licensed medical doctors or physicians and glorifies him as the answer to prayers. By the device of such a transfer the defendant, Kelley, would attain the protection of a shield which would protect him forever against the power of the court to reach him and thus put a stop to his unlawful practice of medicine.

Again a holding to the contrary would provide the defendant, Kelley, with two doors to his office. One door marked "Dentist" would lead to a waiting room where Kelley, as a licensed dentist, could lawfully examine and treat within the limitations of such practice. A second door marked, "Kelley Research Foundation, Inc." or "One Answer to Cancer," will as the pamphlet entreats and urges lead a prospective patient into the same waiting room (as the door market "Dentist") where the defandant, Kelley,

may examine, treat and prescribe and thus engage in the unlawful practice of medicine by doing what he says he can and will do in his book, "One Answer to Cancer."

There is no inherent right to practice medicine. The State through its legislative arm has the authority to license, regulate and control such practice. The courts are authorized to enforce the laws enacted by the legislature.

The rights of speech and publication are not absolute. In a given case in which the public interest is involved the courts are entitled to balance fundamental freedoms and the interest of the State and the welfare of its citizens.

The defendant, Kelley, as the author of, "One Answer to Cancer," clearly intends by the language employed that the purchasers of his book shall act upon the basis of his medical and health advice and he solicits such purchases by his patients through the use of such language.

It would be a useless gesture to permit the defendant, Kelley, individually or d/b/a The Kelley Research Foundation, Inc., neither of whom is licensed as medical doctors to engage in the business of selling and distributing medical advice and offering diagnoses and treatment to the public when under the Texas Medical Practice Act Kelley could not personally do so.

It would be senseless to permit Kelley to continue in such activities free of any control of the court.

The issuance of an injunction against the defendant, Kelley, alone would be wholly ineffective to stop the unlawful practice of medicine if the other defendant was permitted to continue with the sale and distribution of the objectionable pamphlet, "One Answer to Cancer."

All points of error are overruled. The judgment of the trial court is affirmed.

/s/ JACK M. LANGDON

Jack M. Langdon,
Associate Justice.

May 7, 1971

APPENDIX B

No. 59197C

TEXAS STATE BOARD OF MEDICAL EXAMINERS,
Plaintiff,

v.

WILLIAM DONALD KELLEY, Individually, and D/B/A
The Kelley Research Foundation, and
The Kelley Research Foundation, Inc., Individually,
Defendants.

IN THE DISTRICT COURT
TARRANT COUNTY, TEXAS
17TH JUDICIAL DISTRICT

JUDGMENT

On the 30th day of July, 1970, there came on to be heard the above entitled and numbered cause wherein Plaintiff, the Texas State Board of Medical Examiners, seeks a permanent injunction against the Defendants, William Donald Kelley, Individually and d/b/a The Kelley Research Foundation, and The Kelley Research Foundation, Inc., Individually, and in which cause the Plaintiff had theretofore been granted a temporary injunction against the said Defendants; and both parties appeared by and through their respective attorneys and announced ready for trial and no jury having been demanded; and the parties having agreed and stipulated as to the evidence, and it being shown to the Court that the parties hereto have agreed that judgment should be entered by this Court after due consideration of the record including other evidence which has been made a

matter of record in this cause and the statement of facts adduced at the temporary injunction hearing, and the court proceeded to consider the cause; and the court finds and is of the opinion that the temporary injunction heretofore granted should now be perpetuated and that the Defendants should be permanently enjoined as hereinafter provided, for the reason that the Defendants have violated the provisions of the Medical Practice Act of Texas by practicing medicine without a license and will probably continue to do so, all of which is calculated to be, and is, injurious and dangerous to the health, safety and welfare of the public, and such activities of the Defendants as hereinafter prohibited present a clear and present danger of immediate irreparable injury and harm, should the hereinafter provided injunction be not granted; and further, that the contents of a publication entitled "One Answer to Cancer" authored by Defendant, William Donald Kelley, and copyrighted by the Defendant, The Kelley Research Foundation, Inc., professes and would lead the average reasonable individual who reads it to believe that the Defendant, William Donald Kelley, is a licensed medical practitioner under the laws of the State of Texas and that the Defendants, separately and individdually, are able to diagnose, treat, or are offering to treat a disease or disorder, physical deformity or injury or offering to effect cures thereof by charging therefor, directly or indirectly, money or other compensation; that the said publication is calculated to, and in fact does, aid and abet the said Defendants in their unlawful practice of medicine contrary to the express language and the spirit of Article 4510, R.C.S. of Texas, as amended; that the contents of said publication are tantamount to a diagnoses, treatment, or offer to treat a disease or disorder, physical deformity or injury or an offer to effect cures thereof by charging therefor, directly or indirectly, money or other compensation, by Defendants, who are unlicensed in the practice of medicine as defined by the Medical Practice Act, Title 71, Chapter 6, Article 4495-4512, Revised Civil Statutes of Texas.

Therefore, it is accordingly, ORDERED, ADJUDGED and DECREED that the Defendant; to wit, William Donald Kelley,

be, and he is hereby, permanently restrained and enjoined, from practicing medicine in the State of Texas without a license as required by the Medical Practice Act, Title 71, Chapter 6, Article 4495-4512, Revised Civil Statutes of Texas, as amended, and he is hereby particularly restrained and permanently enjoined from publicly distributing, offering for distribution, offering to sell or selling any publication, including the contents of a publication or booklet entitled "One Answer to Cancer" or any other publication, which aids and abets Defendants, William Donald Kelley, and The Kelley Research Foundation, Inc., in the commission of the unlawful practice of medicine by expressly and impliedly proposing to diagnose, treat, or offer to treat a disease or disorder, physical deformity or injury, or offer to effect cures thereof; or from personally diagnosing, treating or offering to treat a disease or disorder, physical deformity or injury, or offering to effect cures thereof, charging therefor, directly or indirectly, money or other compensation.

It is further ORDERED, ADJUDGED and DECREED that the Defendant, to wit, The Kelley Research Foundation, Inc., be, and it is hereby permanently restrained and enjoined, from practicing medicine in the State of Texas without a license as required by the Medical Practice Act, Title 71, Chapter 6, Article 4495-4512, Revised Civil Statutes of Texas, as amended, and it is hereby particularly restrained and permanently enjoined from engaging in the practice of medicine within the State of Texas, to wit, from publicly distributing, offering for distribution, offering to sell or selling any publication which aids and abets Defendants, The Kelley Research Foundation, Inc. and William Donald Kelley, in the commission of the unlawful practice of medicine by expressly or impliedly professing to diagnose, treat or offer to treat a disease or disorder, physical deformity or injury, offer to effect cures thereof; or from diagnosing, treating or offering to treat a disease or disorder, physical deformity or injury, or offering to effect cures thereof and charging therefor, directly or indirectly, money or other compensation; and Defendant, Kelley Research Foundation, Inc., is hereby further and permanently enjoined and restrained

from, and shall desist, from practicing medicine in any manner as defined by Article 4510, Revised Civil Statutes of Texas, as amended, 1925.

However, it is hereby specifically provided that the Defendants, William Donald Kelley, Individually and d/b/a The Kelley Research Foundation, and The Kelley Research Foundation, Inc., are not, hereby, restrained or enjoined from publicly distributing, offering for distribution, offering to sell or selling any publication, the subject matter of which deals and is solely confined to the practice of dentistry, as defined in Title 71, Chapter 9, Articles 4495-4512, Revised Civil Statutes of Texas, as amended.

Plaintiff, Texas State Board of Medical Examiners, is exempted from filing a bond herein, and it is further ordered, adjudged and decreed that such writ of permanent injunction issue without the filing of any bond herein.

The clerk of this court is hereby ordered and directed to issue forthwith a writ of permanent injunction in accordance with the terms of the injunction hereinabove set forth.

It is further ORDERED that the Plaintiff, Texas State Board of Medical Examiners, do have and recover of and from the Defendants, all costs herein, for which execution shall issue.

Whereupon in open court Defendants gave Notice of Appeal to the Court of Civil Appeals.

Signed and entered this 30th day of July, 1970.

/s/ WALTER E. JORDON

Judge Presiding

APPENDIX D

NEW YORK TIMES

Protein Cut Said to Aid Cancer Defense

Special to The New York Times

ATLANTIC CITY, Oct. 20 (AP) — Dr. Robert A. Good, a leading immunologist, said today that he had been able to induce resistance to certain forms of cancer in animals by reducing the amount of protein in their diet.

Dr. Good, a pediatrician at the University of Minnesota, said that as a result of the findings, which raise questions about the role of diet in human cancer, the World Health Organization in Geneva had set up a group to study the relationship between the diets in various countries and the individual's natural defense mechanisms against disease.

In a news conference at the annual meeting of the American College of Surgeons, Dr. Good said that he and his colleagues had been able to foster resistance in certain breast and blood cancers in rats and mice "by just reducing the amount of protein in the diet."

However, too great a protein reduction can produce susceptibility to cancer in the animal experiments, Dr. Good cautioned.

Limited protein deprivation inhibits the production in the body of a substance, called "blocking antibody," that interferes with the body's normal defense mechanisms against cancer and other diseases, Dr. Good said.

High levels of blocking antibody have been found in the blood of persons with cancer, he said, but are absent in normal persons without evidence of cancer.

Dr. Good said that his laboratory was expanding its investigation into the role of diet, and was beginning to look at the roles of total calories, various vitamins, minerals and amino acids in cancer.

Article on Rodent Study

Dr. Good's report to the surgery meeting followed an article last June that he published in the British journal Nature with Dr. David G. Jose, also of the University of Minnesota. The studies with Dr. Jose showed that normally fed animals developed a gamma globulin antibody, IgG, that prevented immune cells from destroying cancerous tumors in the animals.

However, they found that in malnourished rodents, little of this IgG was produced, but that production of the immune cells was normal, making it easier for the underfed animals to reject the cancer.

The doctors suggested in the Nature article that ultimately "it seems possible by nutritional or metabolic manipulation that such a mechanism could open the way to successful immunotherapy of human tumors."

Other scientists working in this area have reported similar findings.

Dr. Roy L. Walford of the University of California School of Medicine in Los Angeles reported last August that rats and mice fed a diet containing just one-third the normal level of calories live up to twice as long as normal and developed 10 to 60 per cent fewer cancers than better-fed animals.

He said his work suggested that man should eat considerably less than he now does, provided he maintained a proper intake of vitamins and minerals.

The relationship between feeding levels and cancer in animals supports a medical observation made over the years that obese people seem to have a greater tendency to develop cancer than do normal-weight individuals.

NEW YORK POST 10/26/71

Says 'Supernutrition' Could Curb Disease

WASHINGTON (AP) — A University of Texas scientist who says he has starved rats by stuffing them with commercial white bread claimed today that proper nutrition might prevent cancer and other diseases.

Dr. Roger J. Williams said supernutrition — a word he coined for nutrition beyond "good" nutrition and unrelated to calories — deserves investigation as "a strategy for the control of disease."

But much remains to be discovered on what constitutes supernutrition, Williams added in a speech prepared for the National Academy of Sciences.

Williams, a biochemist, stirred up considerable controversy after he had told the academy last year that two-third of a group of rats he fed only commercial white bread died within 90 days of malnutrition and that the remainder were severely stunted.

Among his critics were C. Mast Jr., president of the Millers National Federation, and Dr. William B. Bradley, president of the American Institute of Baking.

Mast charged that the experiment was meaningless because the nutritional needs of rats and humans were far different. Bradley said nutritional needs of a person were satisfied by a wide variety of foods and no single food supplied all of man's nutrients.

In today's report to the academy, Williams said the presence of significant unknown nutrients in uncooked food has long been suspected.

Several years ago, Williams said, "we carried out an experiment related to supernutrition. A group of mice already receiving a commercial stock diet, supposedly well supplied with all nutrients, including pantothenic acid, were given an extra supply of calcium pantothenate in their drinking water."

"The result was an increased longevity of about 19 per cent. If this result is achieved by strengthening only one link in the chain, one can legitimately expect the result to be even more striking if one attempted to strengthen all the links," Williams added.

Therefore, Williams said, it seems probable that diseases such as muscular dystrophy, multiple sclerosis and cancer could be prevented by expert application of supernutrition, especially if it could be started with vulnerable individuals at an early age.